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Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request of U S WEST Communications, Inc. for Interconnection Cost Adjustment Mechanisms	)	CC Docket No. 97-90
	)	
	)	File No. C.B./CPD 97-12

COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL

Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("Pacific") (hereinafter collectively "SWBT and Pacific") hereby submit their Comments in response to the Commission's Public Notice in the above-captioned proceeding.

I. INTRODUCTION

The Commission seeks comment on the joint Petition for Declaratory Ruling and Contingent Petition for Preemption ("Petition") filed by Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc. and NEXTLINK Communications, L.L.C. (hereinafter collectively "Petitioners") in response to the Interconnection Cost Adjustment Mechanism ("ICAM") surcharges proposed by U S WEST Communications, Inc. ("U S WEST") in each of the states in which it is operating. Petitioners argue that recovery of incumbent local exchange carrier ("ILEC") costs associated with upgrading or rearranging an ILEC's network to comply with the 1996 Telecommunications Act[1] and the Interconnection Order[2] requirements would

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").

[2]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (*First Report and Order*), CC Docket No. 96-98, FCC 96-325 (Aug. 8, 1996), on appeal sub nom. Iowa Utilities Board v. FCC, No. 96-3321, 8th Cir., filed Sept. 5, 1996 [hereinafter "Interconnection Order"].

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violate section 252(d) of the Act, and would defeat the Act's procompetitive goals.[3] Petitioners therefore request that the Commission: (1) expeditiously issue a declaratory ruling that the initial costs incurred by ILECs to meet the statutory requirements of the Act, not otherwise recoverable pursuant to section 252(d), are not recoverable through state-imposed surcharges on either competitive local exchange carriers ("CLECs") or end user customers; (2) declare that U S WEST's proposed ICAM surcharges violate the Act; and (3) promptly initiate the necessary proceedings to preempt any state legal requirement imposing such a surcharge.[4]

II. THESE MATTERS ARE FOR THE STATES TO DECIDE, ESPECIALLY IN LIGHT OF THE EIGHTH CIRCUIT'S STAY

Implementation of cost recovery mechanisms that enable ILECs to recover the costs associated with upgrading and rearranging their networks does not, as Petitioners allege, constitute a barrier to entry to new market entrants in violation of section 253 of the Act.[5] Petitioners argue that U S WEST's proposed ICAM surcharges would be an "entry fee" imposed by ILECs upon prospective competitors, and would violate the "competitively neutral basis" requirement.[6] Petitioners' request for preemption of any state commission's implementation of such surcharges is a thinly-veiled request for preferential treatment of CLECs, and should be dismissed on that basis alone. Furthermore, the preemptive action sought is legally precluded at present due to the stay of, among other things, the Commission's pricing cost recovery and rate

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[3]Petition at 6.

[4]Id. at 18.

[5]Id. at 4.

[6]Id. at 11.

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structure rules in their entirety.[7] After hearing oral argument in the pending appeal, the Eighth Circuit Court of Appeals decided to stay "the operation and effect of...the pricing provisions" contained in the Interconnection Order pending its final determination of the issues raised by the pending petitions for review.[8] Consequently, the Commission is currently legally estopped from attempting to preempt any state cost recovery/rate structure solution to the matters at issue here, in any event.

As elsewhere recognized by the Commission, state commissions are responsible for implementing the general non-discrimination rules set forth in the Interconnection Order.[9] The Commission expressed faith in the states to continue to gain expertise in connection with issues relating to just, reasonable and nondiscriminatory access and the provision of unbundled elements, and expects to rely on the states' expertise in reviewing and revising Commission rules as necessary.[10] The Eighth Circuit Court of Appeals affirmed this faith by stating that it had no reason to doubt the ability of the state commissions to fulfill their duty to promote competition in the local telephone service markets.[11]

Section 252(d) of the Act specifically provides for state commissions to determine the just and reasonable rate for interconnection and network elements. The Eighth Circuit Court of

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[7]Iowa Utilities Board, et al. v. FCC, No. 96-3321, et al. (8th Cir.) [See *Order Granting Stay Pending Judicial Review* (Oct. 15, 1996), n. 3, staying Final Rules §§ 51.501-51.515 (inclusive), 51.601-51.611 (inclusive) and 51.701-51.717 (inclusive)].

[8]Order Granting Stay Pending Judicial Review, supra, at 8-9.

[9]Interconnection Order at ¶ 310.

[10]Id.

[11]Order Granting Stay Pending Judicial Review, supra, at 20.

Appeals found this provision to be consistent with the historical practice of state commissions determining rates for intrastate communications services.[12] This Commission has acknowledged in an analogous context the propriety of states handling matters of a particularly local nature: "[S]tates are best situated to issue specific rules because of their existing knowledge regarding incumbent LEC networks, capabilities, and performance standards in their separate jurisdictions and because of the role they will play in conducting mediations, arbitrations, and approving agreements."[13] This statement also refutes Petitioners' reliance upon paragraph 125 of the Interconnection Order.[14] Thus, Petitioner's statement that it is inappropriate for state commissions to even address this issue is blatantly incorrect.[15]

III. U S WEST IS ABSOLUTELY CORRECT THAT ILECS ARE ENTITLED TO RECOVER ALL COSTS OF 1996 ACT IMPLEMENTATION

U S WEST developed its ICAM to assist in determining the cost of extraordinary start-up costs it will incur to provide interconnection, unbundled network elements and services available for resale[16] pursuant to sections 251 and 252 of the Act. SWBT and Pacific believe that U S WEST's basic position is correct -- ILECs are clearly entitled to recover all costs incurred in complying with the Act's requirements and the FCC's requirements implementing the Act.

Despite Petitioners' protestations to the contrary, this position is amply supported by the Act and the Interconnection Order. In implementing the Act, the Commission correctly

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[12]Id. at 13.

[13]Interconnection Order at ¶ 310.

[14]Petition at 1.

[15]Id. at 15.

[16]Opposition of U S WEST to Petition at 3.

concluded that section 252(d) specifically provides that the just and reasonable rate for interconnection and network elements shall be based on the cost of such provision, and may include a reasonable profit. The Commission's conclusion is supported by the following language from the Interconnection Order:

> [A] requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[17]
>
> * * *
>
> [T]o the extent incumbent LECs incur costs to provide interconnection or access under sections 252(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.[18]
>
> * * *
>
> [T]he 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network.[19]

Thus, Petitioners' contention that an ILEC's recovery of its extraordinary start-up costs is far beyond the Act's contemplation or the Commission's implementation rules[20] is wrong.

Petitioners base their argument that extraordinary costs should not be included in interconnection and network element charges upon the Commission's forward-looking long-run incremental cost model.[21] Petitioners argue further that although the Commission's pricing rules

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[17]Interconnection Order at ¶ 199.

[18]Id. at ¶ 200.

[19]Id. at ¶ 314.

[20]Petition at 15.

[21]Id. at 8.

in the Interconnection Order have been stayed pending a final decision by the Eighth Circuit Court of Appeals, the Commission's reasoning in promulgating these guidelines is nonetheless correct.[22]

However, the Commission's pricing guidelines do not provide a mechanism for the recovery of network rearrangement costs incurred by ILECs in preparation for their provision of interconnection and unbundled network elements to competitors. Petitioners seem to assume that since forward-looking cost studies do not include one-time, extraordinary costs, recovery of these costs is contrary to the Act. However, as evidenced by the excerpts from the Interconnection Order above, such a proposition is unsupported.

Subpart F of the Interconnection Order's Final Rules containing sections 51.501-51.515 pertains to the pricing of network elements, interconnection and methods of obtaining access to unbundled elements (hereinafter collectively "elements"). The general pricing standard set forth in this subpart is that an ILEC shall offer elements at rates, terms and conditions that are just, reasonable and nondiscriminatory.[23] According to the Interconnection Order, such rates shall comply with the costing and rate structure rules set forth in sections 51.507 and 51.509, respectively, and shall be established by the state commissions.[24] According to the Interconnection Order, these rates, as established by the state commissions, shall be pursuant to the forward-looking economic cost-based pricing methodology set forth in sections 51.505 and

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[22]Id.

[23]Interconnection Order, Appendix B-Final Rules, § 51.503(a).

[24]Id. at § 51.503(b).

51.511, or consistent with the proxy ceilings and ranges set forth in section 51.513.[25] As these specific sections do not provide a means for ILECs to recover their start-up costs, alternative cost recovery methods must be explored.

This is precisely what U S WEST's proposed ICAM surcharge is -- a proposed new rate structure for specific cost recovery under the Act. As noted by the Commission:

> Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnection or to provide access to unbundled elements.[26]

Congress, however, did not intend for the ILECs to bear the full financial burden for opening up local service competition. The Eighth Circuit Court of Appeals was persuaded that, "absent a stay [of the Commission's pricing provisions], the proxy rates would frequently be imposed by the state commissions and would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one."[27] Petitioners admit that the goal of the Act is not to "benefit" or "convenience" one competitor over another, but to promote the development of local telecommunications service competition.[28] Petitioners further state that the ultimate beneficiaries of the Act's interconnection and competition provisions are not competitors, but consumers.[29] However, Petitioners are arguing

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[25]Id. at § 51.503(b)(1)-(2).

[26]Interconnection Order at ¶ 202.

[27]Order Granting Stay Pending Judicial Review, supra, at 18.

[28]Petition at 16.

[29]Id.

contrary to this philosophy in seeking to benefit from these provisions without making their lawful contribution.

IV. ILECS AND STATES MUST HAVE ADEQUATE FLEXIBILITY IN DESIGNING COST RECOVERY MECHANISMS RELATED TO THE 1996 ACT

Section 252(d) is consistent with the historical practice of state commissions determining the rates for local telecommunications services. This same conclusion was reached by the Eighth Circuit Court of Appeals in its decision to stay the Commission's pricing provisions.[30] In its review of the Act, the Eighth Circuit determined that:

> The sections of the Act that directly authorize the state commissions to establish prices are devoid of any command requiring the state commissions to comply with FCC pricing rules (or for that matter, authorizing the FCC to issue any pricing rules). This absence indicates a likelihood that Congress intended to grant the state commissions the authority over pricing of local telephone service, either by approving or disapproving the agreements negotiated by the parties, or...through compulsory arbitration, thereby preserving what historically has been the States' role.[31]

Economics, demographics and the history of regulation vary from state to state. Likewise, the manner in which ILECs incur costs vary from ILEC to ILEC. Therefore, it is only appropriate that the parties who are intimately familiar with these varying conditions be allowed to determine adequate cost recovery mechanisms.

As envisioned by Congress, individual ILECs and state commissions must be accorded broad flexibility to fashion the specific cost recovery methods that are best for their local history and current conditions. Although SWBT and Pacific take no position on the specific plan

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[30]Order Granting Stay Pending Judicial Review, supra, at 13.

[31]Id. at 14.

proposed by U S WEST, they support U S WEST's right to seek approval of an individualized cost recovery method from its respective state commissions.

V. CONCLUSION

The Petitioners' request is premature in light of the current Eighth Circuit Court of Appeals stay and its pending decision. Furthermore, SWBT and Pacific support U S WEST's, as well as any other ILEC's, asserted right to effect full recovery of 1996 Act implementation costs as each state commission may determine to be appropriate.

Respectfully submitted,

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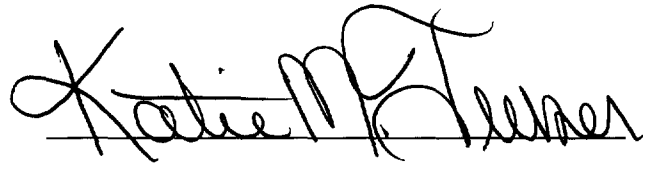
April 3, 1997

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY, PACIFIC BELL AND NEVADA BELL" in Docket No. 97-90 has been filed this 3rd day of April, 1997 to the Parties of Record.



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